

STATEMENT OF HON. F. JAMES SENSENBRENNER, JR.
BEFORE THE SUBCOMMITTEE ON TECHNOLOGY AND THE HOUSE
OF THE COMMITTEE ON RULES
AT THE OVERSIGHT HEARING ON
"RULE X: AN OVERVIEW OF THE CURRENT LEGISLATIVE IMPACT,
ARRANGEMENT, AND EFFECTIVENESS"
June 17, 2004

Mr. Chairman, I am pleased to appear before the Subcommittee on Technology and the House to testify concerning "Rule X: An Overview of the Current Legislative Impact, Arrangement, and Effectiveness." To summarize my position briefly, I believe that the Committee on the Judiciary should retain jurisdiction over all matters that it currently has. In addition, I believe that there are a number of ways in which Rule X could be clarified to strengthen the Committee's jurisdiction and lessen the number of jurisdictional disputes.

Select Committee on Homeland Security

On March 24, 2004, I testified extensively before the Subcommittee on Rules of the Select Committee on Homeland Security about the interplay between the jurisdiction of the Select Committee and the jurisdiction of the Committee on the Judiciary, particularly in the areas of immigration and naturalization, law enforcement agencies at DHS, and law enforcement training at DHS. Rather than repeat that

testimony here, I am attaching a copy of it as an exhibit and I incorporate it here by reference. In short, I believe that the Committee on the Judiciary should retain its current jurisdiction over matters handled by the Department of Homeland Security, but I have an open mind as to whether the Select Committee should continue.

In keeping with my testimony before the Select Committee, however, the Committee on the Judiciary has continued its work in these areas since March 24, and I would like to provide you with a brief update on it.

In the area of immigration and naturalization, the Immigration, Border Security, and Claims Subcommittee held a hearing on May 18 on tools needed by DHS to combat deadly alien smuggling. On April 29, it held a hearing on the diversity visa program and the potential for fraud and abuse there. Today, it will hold a hearing on DHS's overwhelming backlog of unadjudicated immigration petitions and the Bureau of Citizenship and Immigration Services's new plan to address the backlog.

On April 21, the full Committee held a hearing in which Secretary Ridge and Secretary Powell argued for an extension of the deadline by

which countries participating in the visa waiver program need to issue biometric passports. I introduced legislation, H.R. 4417, extending that deadline for one year, and the House passed it on suspension earlier this week.

In other oversight in this area, I have raised my concerns with DHS over the agency's failure to issue a final rule for collection of the SEVIS foreign student tracking program fee and over DHS's denial of P visa status to promising minor league baseball players.

Committee staff have conducted field visits to observe Baltimore harbor cruise line immigration and cargo inspections, FBI processing of Visa Mantis cable requests, State Department Technology Alert List maintenance, South Korea's handling of North Korean refugees, and explosives detectors at train stations.

The Committee has been investigating the status and presence in the United States of aliens suspected in several high-profile criminal cases, including the recent beheading and mutilation of three children in Baltimore, Maryland. With this information, I am assessing weaknesses in our immigration system that have been exploited by criminal aliens.

The Committee has also been investigating the growing alien gang problem in the United States and multiple allegations that the Bureau of Immigration and Customs Enforcement is failing to arrest aliens detained by local law enforcement.

The Committee also has several ongoing investigations and initiatives involving immigration services. We have been monitoring DHS's redesign of the naturalization test. The Committee is also investigating the delays in visa processing caused by failures to perform security checks in a timely manner, complaints that DHS's adoption office in Guatemala is understaffed, and the cause of the DHS budget shortfall that resulted in a hiring freeze at CBP and ICE. In short, the Committee's vigorous work in this area continues apace.

In the law enforcement and law enforcement training area, the Subcommittee on Crime, Terrorism, and Homeland Security held a joint hearing on March 25 with a subcommittee of the Select Committee on Homeland Security on consolidating terrorist watch lists. On April 21, the subcommittee held a hearing and markup on H.R. 2934, a bill to expand the death penalty to additional acts of terrorism. The Committee

will complete consideration of that bill soon. On May 18, the Subcommittee held a hearing on H.R. 3179, a bill to enhance law enforcement powers in stopping terrorism.

The Subcommittee has been working closely with the Select Committee on Homeland Security on H.R. 3266, a bill to improve grants to first responders. The Committee ordered that bill reported yesterday. The Subcommittee is also working closely with the Select Committee on yet to be introduced legislation to reauthorize the Department of Homeland Security. So our work in the DHS law enforcement area continues as well.

Permanent Select Committee on Intelligence

The jurisdiction of the Permanent Select Committee on Intelligence is set forth in Rule X(11)(b). The rule provides that the Committee shall have exclusive jurisdiction over legislation and authorizations of appropriations relating to the Central Intelligence Agency, the Director of Central Intelligence, and the National Foreign Intelligence Program as defined in section 3(6) of the National Security Act of 1947. Rule X(11)(b)(2).

Section 3(6) of the National Security Act of 1947 (50 U.S.C. § 401a(6)) defines the National Foreign Intelligence Program as all programs, projects, and activities of the intelligence community as well as any other programs jointly designated by the Director of Central Intelligence and the head of an agency. The “intelligence community” is defined as a variety of agencies, including the intelligence elements of the Federal Bureau of Investigation, and such other elements of departments or agencies as may be designated. 50 U.S.C. § 401a(4). “Intelligence” is defined to include “foreign intelligence” and “counterintelligence.” 50 U.S.C. § 401a(1). Both of these terms are further defined as information about foreign threats. 50 U.S.C. § 401a(2) & (3).

The Committee on the Judiciary has jurisdiction over criminal law, espionage, and subversive activities affecting the internal security of the United States. Rule X(1)(k)(1), (4), & (18). It is also the general authorizing committee for the FBI.

I understand this chain of rules and definitions to mean the following. With respect to the foreign intelligence activities of the FBI,

the Permanent Select Committee on Intelligence has exclusive jurisdiction. With respect to the domestic intelligence activities of the FBI, the Permanent Select Committee on Intelligence shares jurisdiction with the Committee on the Judiciary.

During the consideration of the FY 04 intelligence authorization bill, two issues arose concerning the intersection of the two committees' jurisdiction. First, one section of the bill (§ 311 of Pub. L. No. 108- 163) gave authority to the FBI to award personal services contracts outside of normal civil service rules for purposes of obtaining special skills for use in its intelligence and counterintelligence missions. In the discussions about whether this provision fell within the exclusive jurisdiction of the Permanent Select Committee, it became apparent that after the terrorist attacks of September 11, it is no longer possible to neatly divide the intelligence activities of the FBI into foreign and domestic realms. In fact, most of these activities now have both foreign and domestic elements. Thus, I believe we may continue to have similar issues about whether provisions relating to intelligence activities of the FBI fall within the exclusive or shared realms.

The second issue relates to the National Drug Intelligence Center. *See* § 104(e) of Pub. L. No. 108- 163. In 1993, the NDIC was created with a mission of conducting foreign drug intelligence. In 1997, it was jointly designated as part of the National Foreign Intelligence Program by the Attorney General and the Director of Central Intelligence. In 2000, as part of the General Counter-drug Intelligence Plan, NDIC's mission was changed to a domestic one, and it remains that today. However, to my knowledge, its designation as part of the National Foreign Intelligence Program has not been changed. So, because of a technicality, it remains within the exclusive jurisdiction of the Permanent Select Committee on Intelligence when it should be properly rest within the shared jurisdiction between the two committees. This issue illustrates the problem with leaving the jurisdiction of House committees dependent on executive branch actions.

I do not necessarily think that these issues require an immediate change to the Rules. However, in the post-9/11 world, it is likely that we will face similar issues. At this point, I am simply bringing them to your attention for further thought.

Interstate Commerce

Over the years, any number of disagreements have existed between the Committee on Energy and Commerce and the Committee on the Judiciary. The Committee on Energy and Commerce has jurisdiction over “Interstate and foreign commerce generally.” Rule X(1)(f)(5). At the same time, the Committee on the Judiciary has jurisdiction over “Patents, the Patent and Trademark Office, copyrights, and trademarks” and “Protection of trade and commerce against unlawful restraints and monopolies.” Rule X(1)(k)(13) & (15).

In many of these disagreements, the jurisdiction over the various provisions is fairly clear, and the dispute boils down to a political one – i.e., which Committee has the better solution to the problem? However, in some cases, the jurisdiction is less clear.

I believe that in some cases, the Committee on the Judiciary’s jurisdiction has been read too narrowly. Specifically, the sequential referral of H.R. 1542 (a telecommunications bill) to the Committee on the Judiciary in the 107th Congress was unusual in that it specified the exact sections for which the bill was being referred. Although that kind

of referral is permitted under the rules, it is rarely used. In that case, I believe insufficient weight was given to the long history of shared jurisdiction between the two committees over telecommunications as set forth in the lengthy letter I sent requesting the referral.

However, I think this case illustrates a broader problem. Our jurisdiction over protection of commerce against unlawful restraints and monopolies does not begin and end with antitrust law. For example, it clearly covers state taxes affecting interstate commerce. But to properly analyze whether commerce is being unlawfully restrained or monopolized, the Committee must consider competition in the affected markets from a general perspective. Thus, I believe it would be helpful to add language to the rule that clarifies that it goes to competitive conditions in markets generally.

Department of Justice

The Committee on the Judiciary, by virtue of its areas of substantive jurisdiction, oversees the vast majority of the programs and activities of the Department of Justice. In the limited area of certain juvenile justice and related programs administered by the Department,

the Committee on Education and the Workforce has primary jurisdiction.

Given the Committee on the Judiciary's longstanding jurisdiction over most of the Department and the close relationship that exists between the Committee and the Department, the Committee on the Judiciary is in the best position to take an overall view of the Department, to advocate for it within the Congress, and to provide it continuing congressional guidance. It is the only Committee in the House that has the jurisdiction and expertise to consider the Department as a whole.

Thus, I believe it would be useful to add language to Rule X that would clarify that the Committee on the Judiciary shares jurisdiction over this area. In making this request, I do not seek to divest the Committee on Education and the Workforce of its jurisdiction nor its leading role in this area. I simply want to allow the Committee on the Judiciary to be able to apply its expertise in considering these programs from an overall Department perspective.

Administrative Procedure

Under House Rule X(1)(k)(2), the Committee on the Judiciary has

jurisdiction over “Administrative practice and procedure.” The House Parliamentarian’s Office takes the position, however, that our jurisdiction extends only to general matters that involve administrative practice and procedure for the entire executive branch. The Office believes that another committee with jurisdiction over an agency has jurisdiction over any administrative practice or procedure for that agency alone, and in its view, that single agency procedure does not fall within the Committee on the Judiciary’s jurisdiction under House Rule X(1)(k)(2).

I respectfully disagree on this point. The rule does not add the word “generally” which is used in other provisions to draw this kind of distinction. *Compare* House Rule X(1)(k)(9) (Committee on the Judiciary has jurisdiction over “Interstate compacts generally.”) The Office’s interpretation significantly limits the Committee’s jurisdiction in the area of administrative practice and procedure and makes it difficult to maintain any kind of consistency in this area across the entire government. Thus, I believe the rule should be changed to clarify that the Committee’s jurisdiction extends to administrative practices and

procedures as they apply to single agencies as well as generally.

Civil Fines

A similar problem has arisen with respect to civil fines. The Committee on the Judiciary has jurisdiction over “The judiciary and judicial proceedings, civil and criminal.” House Rule X(1)(k)(1). Many committees pass legislation allowing an agency within their jurisdiction to assess a civil fine. Almost always, the expectation is that the civil fine language will be enforced in a court action; sometimes that is explicitly stated and sometimes not. However, the House Parliamentarian’s Office takes the position that such provisions do not fall within the Committee on the Judiciary’s jurisdiction under House Rule X(1)(k)(1) unless there is specific mention of a court action.

Again, I respectfully disagree. New law that provides for a civil fine that will be enforced in a judicial proceeding, whether that enforcement is explicit or not, is within the meaning of Rule X(1)(k)(1), and it adds a burden on the courts. The Committee on the Judiciary has the responsibility for the courts, and it should have a say when their burden is increased. For that reason, I believe the rule should be

changed to clarify that the Committee on the Judiciary has jurisdiction over all civil fines.

Grants

With respect to the recent highway bill, the Committee faced another interpretive issue. Section 1810 of the bill provided for the Department of Transportation to make grants to states that adopt certain policies with respect to racial profiling in the enforcement of State laws regulating the use of Federal-aid highways. I believe that this provision falls squarely within the civil liberties jurisdiction of the Committee on the Judiciary. Rule X(1)(k)(5). *See, e.g.,* H.R. 3847 in the 108th Congress (bill on racial profiling referred exclusively to Judiciary).

However, the House Parliamentarian's Office took the position that because the grant was administered by DOT and because it related to traffic matters, no Judiciary conferees would be appointed on this provision. I believe it is a mistake to rely so heavily on the agency administering the grant in determining how to refer such provisions. This invites gamesmanship and is likely to lead to programs being

placed in agencies that do not have appropriate expertise. I believe that the primary referrals of such grant provisions should be based on the substance of the program at issue and not the agency administering the grant.

Making Matters Explicit

Finally, there are a number of matters that are clearly within the Committee on the Judiciary's jurisdiction, but that jurisdiction is not clearly stated in Rule X(1)(k). For example, it is widely understood that the Committee on the Judiciary has jurisdiction over all matters of substantive criminal law. However, that jurisdiction rests on Rule X(1)(k)(1) which covers "[t]he judiciary and judicial proceedings, civil and criminal." I believe it would be helpful to have a clearer statement of the Committee's jurisdiction over substantive criminal law.

For example, the Committee on the Judiciary and the Committee on Energy and Commerce have jurisdiction over certain aspects of illegal drug matters. The Committee on the Judiciary has jurisdiction over criminal provisions, and the Committee on Energy and Commerce has jurisdiction over the scheduling of drugs. However, the clarification

I am seeking would remove any doubt about this division of responsibility.

The Committee also has jurisdiction over the grant of law enforcement power and the training of law enforcement personnel. However, again, this jurisdiction rests on Rule X(1)(k)(1) and should be made clearer and more explicit.

The Committee has jurisdiction over the state taxes affecting interstate commerce. This jurisdiction rests on Rule X(1)(k)(15): “[p]rotection of trade and commerce against unlawful restraints....” I believe it would be helpful to make this jurisdiction clearer.

The Committee has traditionally considered articles of impeachment when they have been introduced. It would eliminate confusion and establish a more regular order if that were stated explicitly in the rule.

The Committee has long had jurisdiction over immigration and naturalization matters. A growing issue in this area is identity cards for immigrants. The Committee has been very active in this area, and I believe that making this matter explicit in the rule would be a helpful

addition.

In listing these topics, I do not express any doubt that the Committee has exclusive jurisdiction over these matters. I simply call them to your attention as areas in which a more explicit statement of that jurisdiction would eliminate confusion.

Protecting a Committee's Jurisdiction

One other matter that I would like to bring to your attention is the lack of a remedy for a Committee when another Committee treads on its jurisdiction in certain ways. The Committee on the Judiciary has experienced other committees holding hearings on matters that are clearly within our jurisdiction. Under the current rules, we are left with no real remedy except for complaining. The same applies with respect to amendments brought up at markups. In that case, we have no remedy other than to rely on a Member of the offending committee to raise a point of order. I do not have a specific solution in mind, but I commend this problem to you for your thoughts.

Conclusion

In general, I believe that Rule X is working well. The Committee on the Judiciary should retain all the matters over which it now has jurisdiction. However, as I have outlined above, there are a number of areas in which some clarification would provide clearer guidance, and I respectfully request your attention to these areas.